(23)

No. 1117

In the Supreme Court of the United States

October Term, 1944.

A. H. KASISHKE, CORALENA OIL COMPANY, A DELAWARE CORPORATION, AND OLIVE DRILLING COMPANY, AN OKLAHOMA CORPORATION,
Petitioners,
vs.
B. A. BAKER, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

CONN LINN,
PAT MALLOY, JR.,
M. A. BRECKINRIDGE,
Attorneys for Respondent.

April 24, 1945.

TABLE OF CASES.

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STATUTES.

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Respondent B. A. Baker would respectfully draw to the attention of the court that the petition is devoid of any valid grounds or reasons for the issuance of the writ of *certiorari.*

The petition raises no federal question of any kind or character; it raises no question of conflict of circuits; it raises no question of a general public nature such as would impel this court to exercise its discretion by the granting of the writ. It sets forth no clear conflict between the Circuit Court opinion and any decisions from the Supreme Court of Oklahoma. It sets forth no applicable statute of Oklahoma ignored or violated. It presents a simple suit in equity between private parties; it makes no claim that the judgment is inequitable; it makes no claim that any substantial

rights of the petitioners have been invaded. They virtually admit that the writ should not issue. They pray that this court issue the writ because:

> "It is against the public interest to permit those decisions to stand, as they will cause untold confusion and hardships and will be the incentive for a flood of litigation, particularly in the federal courts, by employees seeking to establish joint adventures through oral promises which do not comply with the established law of Oklahoma." (Pet. 32, 33.)

In other words, they are seeking to invoke the jurisdiction of this court to hear and determine moot or academic questions in which they have no present interest.

From pages 2 through 9 will be found what petitioners claim a "Summary Statement." This statement is shot through with errors of omission and commission. We do not make a counter statement for the sake of brevity, contenting ourselves with the invitation to the court to examine very carefully the findings of fact and conclusions of law made and entered by the trial court and affirmed by the Circuit Court of Appeals. All challenge to these findings of fact was abandoned in the brief and oral argument in the Circuit Court of Appeals, precluding any challenge against them here as is artfully attempted. A comparison of the statements made by petitioners with the findings of fact made by the trial court will disclose many contradictions. On pages 2 and 3 petitioners greatly magnify the importance of the lower court's decision as it affects the oil industry, especially respecting the oil business in the future. They speak specifically of Oklahoma, Kansas and New Mexico and they would have this court lay down for the Tenth Circuit a binding, uniform system regarding joint adventures,

and at the same time they denounce the Circuit Court's opinion because it is in flagrant violation of the *Tompkins* case which requires, of course, that the Circuit Court of Appeals shall follow the decisions of the respective states, rather than this Court's.

Let us say, had the case been of the importance suggested in the petition, the judges who sat and decided the case in the Circuit Court of Appeals would have sensed and corrected it more quickly than anyone, as Judge BRATTON who presided, is from New Mexico, a former United States Senator and former member of the Supreme Court of that state. Judge HUXMAN was one time governor of the State of Kansas and a distinguished, life-long member of the bar of that state, and Judge MURRAH, a distinguished practicing lawyer of Oklahoma prior to his appointment, first to the United States District Judgeship and then to the Circuit Court of Appeals.

—*MacGregor* v. *State Mutual Life Ins. Co.*, 315 U. S. 280, 62 Sup. Ct. 607, 86 L. ed. 486:

No amount of words or phrases on petitioners' part can magnify this case into one of public interest. It is too well understood by bench and bar that joint adventures are peculiarly dependent upon the facts of the particular case. It is the most informal agreement known to the law. It may be created by conduct alone; requires no writing; no express contract. A decision in one case is of practically no importance as a precedent in another. Oklahoma, Kansas, all of the States of the Union that have had anything to say about it have so held. The Circuit Court opinion covers this question very concisely.

As we heretofore have stated, there is no complaint made that on the merits petitioners have been injured. They

did not challenge any of the findings of fact of the trial court in the Circuit Court of Appeals. Respondent, therefore, came to that court with all the equities in his possession while petitioners came empty handed. In the Circuit Court of Appeals as here it developed into a contest between equity and technicalities. It is needless to say that the Circuit Court of Appeals wiped aside the technicalities in favor of justice and equity. Petitioners' main contention is based upon the theory that the court erroneously held that the status of the parties was that of joint adventurers. In our opinion, it makes no difference whether the technical definition or the status of the parties was that of joint adventure as in all events it was of a fiduciary character requiring the rights, remedies and relief to be determined by those principles of equity peculiarly applicable to fiduciary relationships. In respondent's judgment, it makes no difference whether the relationship was purely one by operation of law, joint adventure, mining partnership or partnership, the relief in equity had to be the same.

Here, let us refer to the conceded facts as disclosed by the record:

In 1928 petitioner Kasishke employed this respondent as a bookkeeper; within 2 years he was elevated to secretary-treasurer and drawing close to $2,000.00 per month. Petitioner Kasishke and respondent from then on became the very closest friends, socially and in a business way. Kasishke by reason of his age—being ten years older, his money and the very fatherly treatment accorded respondent, was the dominant personality. So that in 1932 when the agreement herein was made, at least so far as respondent is concerned, there could not have been any agreement made

between them at arm's length. Any agreement would have been conceived and born in the most intimate fiduciary relationship. Then when respondent permitted the titles of the leases which they were to and did acquire, to be taken in the name of A. H. Kasishke, Inc., or any *alter ego* of Kasishke, a trust by operation of law immediately sprang into being. Of this there can be no doubt, it was by the court below as a matter of fact so found and so held. Thereafter the rights, remedies and relief accorded to respondent would have been entirely controlled by those principles of equity pertaining to trusts by operation of law. In other words, the status of the parties was at least that of trustee and *cestui que trust.* And if it be conceded for the sake of argument that the courts below erroneously stated the status of the parties to be joint adventurers rather than trustee and *cestui que trust,* no substantial injury could possibly have been inflicted upon petitioners, as the relief in either event was identical. The fact is that in Oklahoma since territorial days to the present, joint adventures, where as here titles are taken in the name of one of the venturers only, are placed in the same category, so far as rights, remedies and relief are concerned, as constructive trusts. There is an unbroken line of cases on this subject.

—*Dike* v. *Martin,* 85 Okl. 103, 204 Pac. 1106;
Cassidy v. *Gould,* 86 Okl. 217, 208 Pac. 780;
Cassidy v. *Hornor,* 86 Okl. 220, 208 Pac. 775;
Blackstock Oil Co. v. *Caston,* 184 Okl. 489, 87 P. (2d) 1087;
Vilbig Construction Co. v. *Whitman,* (Okla., not yet officially reported) 152 P. (2d) 916.

If we should strike out all reference to joint adventure in this case it still would have to be held a constructive

trust, carrying with it the identical relief decreed by the judgment of the trial court. Thus the judgment is just and equitable, the securing of which is the goal of all courts of equity, and we respectfully submit that a just and equitable judgment should not be disturbed unless for the most cogent reasons, none of which appears here.

Respondent respectfully submits, therefore, that any reference to joint adventure in the case might be treated as surplusage or harmless error not affecting the substantial rights of the petitioners.

As we understand, the petitioners must show that they have been injuriously affected in their substantial rights by the decision of the lower court before they would be entitled to have the issuance of the writ of *certiorari*. The harmless error statute of Oklahoma is very similar to that in the federal jurisdiction.

McCabe & Steen Construction Co. v. *Wilson*, 52 L. ed. 971:

This court here quotes the Oklahoma statute:

> "The court in every stage of action must disregard any error, defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

In *Chenault* v. *Mauer*, 54 Okl. 651, 150 Pac. 507, it was held:

> "A decision of law reached by the wrongful application of a rule of law is harmless if the application of the correct rule of law would have cast an equal burden upon the adverse parties."

In *Nelson* v. *Davidson*, 45 Okl. 256, 145 Pac. 772, it is said:

"Where it does not appear that any errors complained of resulted in a *miscarriage* of justice the judgment will be affirmed under Rev. Laws 1910, Sec. 6005." (Italics ours.)

In *Palmer* v. *Hoffman*, 318 U. S. 109, 120, 87 L. ed. 646, this court held:

"Rulings of lower federal court applying local law will not be set aside by the Supreme Court except on a plain showing of error."

In *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 78, 80, 87 L. ed. 626, this court gave the reason why this rule obtains:

"The reason for the rule that the decision of a lower court must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason, is that it would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court has concluded should properly be based on another ground within the power of the appellate court to formulate."

As we have shown, petitioners are seeking to protect the *future* interest of the oil industry, not complaining that so far as the merits are concerned in the instant case they have in any manner been injured. We therefore respectfully submit there is no good or valid reason why in this particular case the writ should issue as the judgment is correct on the unchallenged facts.

We shall now address ourselves to the contentions made by petitioners in the order in which they have presented them and we shall attempt, and think we shall demonstrate beyond question that the Circuit Court opinion is not in

conflict with any of the Oklahoma decisions relied upon by petitioners; that under the Oklahoma law the sharing of losses is not a necessary element in the creation of a joint adventure; that the lower courts were thoroughly justified under Oklahoma decisions in holding that the present case was one of joint adventure and that no statutes of Oklahoma were ignored or violated by the Circuit Court opinion.

Coming now to a consideration of the points made under Proposition I, we take up (A). Here petitioners say:

> "A joint adventure was not established because there was no agreement between the parties to share losses."

Petitioners intimate that the Circuit Court decision conflicts with Oklahoma decisions holding that the sharing of losses is a necessary element of joint adventure, relying largely upon *White* v. *A. C. Houston Lumber Co.*, 179 Okl. 89, 64 P. (2d) 908, 910. We quote a part of the holding therein:

> "*(1)* There must be joint interest in the property by the parties sought to be held as partners; *(2)* there must be agreements, express or implied, to share in the profits and losses of the venture and *(3)* there must be actions and conduct showing cooperation in the project."

Now let us examine the Circuit Court opinion to see if there is any conflict. We quote from the eighth paragraph of the syllabus of this case to be found in 146 F. (2d) 113:

> "There must be joint interest in property, agreement to share in profits and losses from venture and action and conduct showing cooperation in the property to constitute a 'joint adventure' which is more limited in its scope of operation than a partnership."

For authority what, if any, decision does the Circuit Court cite? *White* v. *A. C. Houston Lumber Co., supra!* The language in the Oklahoma decision is almost word for word that used by the Circuit Court of Appeals. If this is conflict, let them make the most of it. Now the Circuit Court said:

> "In determining whether one shares in the losses, the fact that one works for a nominal salary, thus losing a part of the value of his services will be taken into account."

This particular question never has been passed upon in any case by the Supreme Court of Oklahoma and therefore cannot produce any conflict.

With respect to the statement of nominal salary the record will disclose that respondent had received as much as $2,000.00 a month from petitioner Kasishke in another line of business but here he received but $150.00 a month to begin with and although the properties had become worth probably six million dollars, respondent's salary was never more than $300.00 a month. (See Finding of Fact VII, pp. 60, 62, Tr.) Petitioners say, however, that because the court made the parenthetical statement:

> "It has been held that it is not absolutely necessary that there be participation in both profits and losses,"

the court intended to hold such to be the law. This statement by the court which was taken from the leading case in Oklahoma of *E. D. Bedwell Coal Co.* v. *State Industrial Comm.*, 11 P. (2d) 527, in our judgment, cannot by any stretch of the imagination be tortured into any such holding. We shall have something more to say about the *Bedwell* case later.

It is claimed that since the *White* case the decision in the *Bedwell* case, *supra,* has been superseded (Pet. 16), and they further claim that since the *White* case *all* cases in Oklahoma have followed the rule laid down in that case. They contend that in the latest case of *Conley Drilling Co.* v. *Rogers,* 191 Okl. 667, 132 P. (2d) 959, it "squarely holds that it is essential to the existence of a joint adventure that the parties agree to share losses." And as a substantiation of that claim at the top of page 16 of the petition they claim to quote from the third paragraph of the syllabus, as follows

> "Generally before a mining partnership can exist, there must be a joint interest in the property, an agreement express or implied to develop it, and to share in the profits and losses incident to the venture, and conduct showing a cooperation between the parties in the venture."

Now let us examine these claims. *First,* as to the statement that all cases since the *White-Houston* case have followed it superseding the holding in the *E. D. Bedwell* case. The *White* case is reported in *64* P. (2d). In *Commercial Lumber Co.* v. *Nelson,* also cited by petitioners, 181 Okl. 122, *72* P. (2d) 829, decided a few months after the *White* case, and in *Sand Springs Home* v. *Dail,* 187 Okl. 431, 103 P. (2d) 524, erroneously cited by petitioners as 103 P., leaving out the (2d), cited also in petitioner's brief, the *E. D. Bedwell* case was followed rather than the *White-Houston* case. In *Commercial Lumber Co.* v. *Nelson, supra,* it is said:

> "As pointed out in the case of *E. D. Bedwell Coal Co.* v. *State Industrial Commission, supra,* a profit jointly sought in a single transaction by parties thereto is the *chief* characteristic of a joint adventure." (Italics ours.)

The *Sand Springs Home* case was decided more than three years after the *White* case. In that case the Supreme Court of Oklahoma quotes with approval the following from the *E. D. Bedwell Coal Company* case as follows:

> "Joint adventures being special combinations of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership designation, there is no reason why the parties by special agreement could not limit their respective profits and provide by their specific contract which particular part of the expenses each party should bear before participating in any profits."

It is evident that the word "expenses" was meant to include losses, as in the *Bedwell* case it is said:

> "It is next asserted that there must be a participation in both profits and losses. Again the assertion is too broad. Many cases might be cited where a joint adventure was held to exist when one of the parties, while entitled to share in the profits, if any, was not obligated for any loss. *Warwick* v. *Stockton*, 55 N. J. Eq. 61, 36 A. 488; *Reid* v. *Shaffer*, (C. C. A.) 249 F. 553.
>
> "It would appear from the above authorities that the agreement to share losses, if any, is not essential, the rate or ratio in which each shall share in the profits of a joint adventure may be fixed by the special contract."

Now coming to the *Conley* case, *supra*, which petitioners state "squarely" holds that it is essential to the existence of a joint adventure that the parties agree to share losses, let us see if this is true. Turning to the body of the opinion it will be found that appellant there contended that there is no joint adventure because all the requirements set forth in the *White* case were not present. However, the Supreme Court held that they were and therefore decided

the case upon the assumption that if the requirements therein stated were necessary as contended for by appellants, still the case was one of joint adventure. The court therefore was not called upon to determine squarely whether the sharing of losses was a necessary element.

Petitioners quote what they say is the third paragraph of the syllabus. The third paragraph of the syllabus in our copy of the official reports is as follows:

> "An assignment that the court erred in admitting evidence without specifically pointing out the evidence objected to is too indefinite to require consideration by this court."

However, in paragraph 2 of the syllabus from the official Oklahoma reports it is held:

> "In an action brought to hold parties liable as mining partners where there is evidence of a joint interest in the mining property and of an express or implied agreement to share in the profits and losses of the venture and conduct showing cooperation in the project between the parties there is sufficient evidence to base a finding of a mining partnership."

The difference between the language of the third paragraph of the syllabus as petitioners cite it and the second paragraph of the syllabus taken from the Oklahoma reports is so obvious that further comment is unnecessary.

That there is no crystalized system as contended for by petitioners, formulated by the Supreme Court of Oklahoma in 1937, is clearly established by the decision in the *Sand Springs Home* case decided more than three years thereafter. Petitioners claim that in 1937 the Supreme Court established a crystalized system respecting the essentials of a joint adventure and they say this was done by the Supreme

Court in the *White-Houston* case. Now let us examine that case for a moment. The chief and deciding point in that case was whether there was such joint interest between the parties as is necessary to constitute a joint adventure. In our judgment, the court answered that question clearly by saying there was none and that effectually settled the entire lawsuit. What was said respecting a generalized rule as to the elements of joint adventure was wholly uncalled for. The question of the necessity of sharing losses was not necessarily involved. Moreover, the opinion was not written by any member of the Supreme Court of Oklahoma, it was what is known in Oklahoma now as a "farmed out" case, to three lawyers of the Tulsa Bar, one of whom wrote the opinion which was concurred in by the other two. This opinion and record were then sent back to the Clerk of the Supreme Court and thereafter one member of the court examined the opinion prepared by the Tulsa lawyers and recommended that it should be adopted by the whole court. This practice was an expedient of doubtful benefit as later results have shown, adopted by the court to relieve a very much congested docket. (See last paragraph of the case.) Results were the main thing sought. This committee of lawyers, as so often is the case with men who have had no prior judicial experience, did not stop when they had decided the vital points therein but tried to cover the entire law of joint adventure. It is evident that they were not fully advised as to the law in Oklahoma inasmuch as they did not refer to the following statutes from Oklahoma, Chap. 1, Title 54, Sec. 1, Okla. Stats. Ann.:

> "Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them."

And Sec. 6 of the same title which provides as follows:

> "An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated."

And *Foster* v. *Wilkinson*, 96 Okl. 110, 220 Pac. 325, construing this statute in which it is said, among other things:

> "In other words it should appear from the evidence that it was the intention of the parties that they were entering into an association for carrying on business together and sharing the profits, which implies an agreement to divide the losses unless otherwise agreed."

They did not cite nor refer to *Municipal Pav. Co.* v. *Herring*, 50 Okl. 470, 150 P. 1067, so heavily relied upon by petitioners, which holds that one of the distinctions between joint adventures and partnership is that in the former there is no necessity for a contract, express or implied, for the sharing of losses. They did not refer to nor in anywise criticize the *E. D. Bedwell* case, *supra*, which at that time was the most recent expression of our Supreme Court, a case in which the question was squarely raised and squarely passed upon by our Supreme Court. We submit that there is no probability of our Supreme Court upholding *White* v. *A. C. Houston Lumber Co.*, when the statutes and these other decisions, including *Sand Springs Home* v. *Dail*, *supra*, decided more than three years after the *White* case are brought to the attention of the court. We therefore respectfully submit that there is no merit in petitioners' contention under (A) of Proposition I, *first*, because the Circuit court opinion instead of conflicting, follows *White* v. *A. C. Houston Lumber Co.* *Secondly*, because the true rule in all probability in Oklahoma will be that announced in *E. D. Bedwell Coal Co.*

v. *State Industrial Comm.*, and affirmed in the *Sand Springs Home* case.

This further thought: Because in the *White* case the statutes and other decisions hereinabove cited were not referred to or in any manner modified, they will be taken as the true rule in Oklahoma rather than *White* v. *Houston Lumber Co.* See Sections 1 and 2 of the syllabus in *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.*, 118 F. (2d) 252.

On pages 18 and 19 petitioners claim that respondent had no present interest in the properties and therefore there could be no joint adventure. This statement is squarely in the teeth of the findings of fact of the trial court and the holding in the Circuit Court of Appeals. And inasmuch as the question whether a joint adventure *in praesenti* or *in futuro* was one of fact decided in respondent's favor, and the further fact that no challenge to this finding of fact was made in the Circuit Court of Appeals, we do not take up further time answering it.

Responding to (C):

> "Respondent failed to establish a joint adventure because the evidence showed that he had no equal right of management,"

we call attention to the fact that petitioners rely mainly upon *Municipal Paving Co.* v. *Herring, supra,* why, we are at a loss to understand, because in that case the court held the status of the parties to be joint adventurers rather than partners because there one of the parties had no equal right of management with the others. Just as we cannot understand why they cite this same case to the point that the sharing of losses is a necessary element in order to constitute a joint adventure, as in that case the court specifically holds

to the contrary on both points. This case has been cited since as an authority on joint adventure by the Supreme Court of Oklahoma in two cases:

Twyford v. *Sonken-Galamba Corp.*, 177 Okl. 486, 60 P. (2d) 1050;

Sand Springs Home v. *Dail*, 187 Okl. 431, 103 P. (2d) 524.

In the following cases from Oklahoma upheld as joint adventures, the management was confided to one of the joint adventurers to the exclusion of the others:

Twyford v. *Sonken-Galamba Corp., supra*;

Sand Springs Home v. *Dail, supra;*

E. D. Bedwell Coal Co. v. *State Industrial Comm. supra;*

Vilbig Construction Co. v. *Whitman*, 152 P. (2d) 916;

Blackstock Oil Co. v. *Caston*, 184 Okl. 489, 87 P. (2d) 1087.

We cite these in addition to the cases cited by the Circuit Court of Appeals. We take the following from the 5th paragraph of the syllabus prepared by the West Publishing Company in the *Sonken-Galamba*, case, *supra:*

> "Joint adventurer held authorized to grant exclusive possession and right of liquidation of property belonging to joint adventurers as tenants in common to coadventurer."

Under (D), petitioners contend:

> "A joint adventure must be limited to a specific venture."

This question is completely answered by the opinion in the Circuit Court of Appeals.

Under (D) petitioners say:

> "The Supreme Court of Oklahoma has held many times that a joint adventure is a special combination of two or more persons seeking jointly, without any actual partnership or corporate designation, a profit in some specific venture."

Attached is a footnote numbered 5, in which it is said:

> "As respondent conceded that the 'venture' was to be conducted *as a corporation*, it could not be a joint adventure."

First, we did not concede that it was being run as a corporation but through a corporation, but this makes no substantial difference. It will be noted that petitioners cite no authority in support of their statement that under such circumstances it could not be a joint adventure. Moreover, the latest Oklahoma Supreme Court definition of a joint adventure, so far as we have been able to gather, is contained in *Vilbig Construction Co.* v. *Whitman, supra,* as follows:

> "A joint adventure is a special combination of two or more persons whether corporation, individual or otherwise, where in some specific venture a profit is jointly sought without the necessity of any actual partnership or corporate designation."

Which is a very different definition from that contained on page 22 of the petition.

With respect to the statement that a corporation may not be the vehicle through which a joint adventure is carried out, we cite the following cases from Oklahoma to the contrary:

Municipal Paving Co. v. *Herring, supra;*

E. D. Bedwell Coal Co. v. *State Industrial Comm., supra;*

Twyford v. *Sonken-Galamba Corp., supra;*
Blackstock Oil Co. v. *Caston, supra;*
Vilbig Construction Co. v. *Whitman, supra.*

Many others might be cited.

Under (E) the contention is made:

> "This is not a case in which the corporate entity may be disregarded."

Contrary to the findings of the lower court and the Circuit Court, petitioners attempt here to argue that Mrs. Kasiske was a bona fide stockholder in the corporation, which is all contrary to the record. The stock was given to her by her husband, usually for tax purposes. (See findings of fact.) Petitioner Kasishke juggled the stock as the exigency of the case suggested. The evidence discloses, and the lower court and the Circuit Court affirmed, that Mrs. Kasiske, like respondent Baker, signed her stock in blank and returned it to Kasishke. There is a deposition put in evidence by petitioners of one Earl Brown which so conclusively shows that it was a one-man corporation, owned and controlled by A. H. Kasishke, that further comment is unnecessary. (Tr. 121, 122, 284, 289)

It is stated at the bottom of page 23:

> "The record shows that Mrs. Kasishke participated in the affairs of the company as a director and as a stockholder."

Whereas the lower court found upon the uncontradicted testimony that no directors' or stockholders' meetings were held. Mrs. Kasishke stated that she did talk to her husband about business while riding along in the car or at home but she reluctantly admitted that she never attended any formal meetings of directors or stockholders. Petitioners in sup-

port of their contention cite the case of *State, ex rel.*, v. *Tulsa Flower Exchange*, 135 P. (2d) 46-47. It was never intended by this case to in any way modify the equitable doctrine of *alter ego*. The case went off on the word "control" as used in a provision of the State Employment Security Act. In the body of the opinion it is said:

> "The facts which allegedly make the two defendants a single employer are that the defendant Tinger as an individual owns the Sand Springs Greenhouse outright, and owns also 70 per cent of the capital stock of the Tulsa Flower Exchange, a corporation, and as such stockholder controls the corporation, which it is said makes the two defendants controlled * * * directly by the same interest within the meaning of said paragraph (4)."

Says the court:

> "It is shown, however, that the two businesses are operated separately and are related in no way, except Tinger controls the one outright and exercises control of the other as majority stockholder. Tinger is said to be the 'interest' which controls the two 'employing units by legally enforceable means or otherwise.'
>
> "According to said paragraph (4) the control of the separate units must be 'direct control,' or the immediate right to enforce the right to direct control, by the same 'interest' in order for the combined units to constitute a single 'employer' within the meaning of the statute."

It will be seen at once that the decision here in no way attempts to repudiate the universal doctrine in this country pertaining to *alter ego*. Indirect control is sufficient to support the *alter ego* doctrine.

It is stated in (F), (Pet. 26):

> "The alleged oral contract is unenforceable be-

cause of the provisions of the Oklahoma statute of uses and trusts and the statute of frauds."

Counsel's statements in the first paragraph thereunder are entirely incorrect. The record will disclose, contrary to petitioners' contention, that the defense of an oral express trust was not alleged in their pleadings by petitioners. It was not thought of until it reached the Circuit Court of Appeals. Express trusts and the statute of frauds must not be confused. The statute of frauds is found in Title 15, Sec. 136, Oklahoma Statutes 1941, whereas the statute of uses is found in Title 60, Sec. 136, Oklahoma Statutes 1941. The petitioners did set up the statute of frauds as a defense as well as the statute of limitations, but not a word with respect to the statute of uses. This was brought to the attention of the Circuit Court of Appeals by respondent. In our judgment, it could not have been raised for the first time in the Circuit Court of Appeals; furthermore, there is not one word of testimony in the record which justifies in the slightest the contention made by the petitioners here that it was an attempt to create an oral express trust. The testimony of respondent with respect to the agreement is set out in full in the petition. There is not a word in it referring to any person or corporation other than the respondent and the petitioner Kasishke. The properties were taken in the name of Kasishke's *alter ego* or nominee by tacit consent. There is not a word in this testimony that Kasishke or his nominee or the holder of the titles was to convey a single thing, much less oil and gas leases to respondent. In other words there is not a line indicating that Kasishke or the corporations his *alter egos* was to convey anything to Baker. The statute of frauds in such case has no application. The case is ruled in this respect by *Chowning* v. *Gra-*

ham, 74 Okl. 232, 178 Pac. 676. Furthermore, the statute of frauds does not apply in fiduciary relationships such as trusts by operation of law, joint adventures or co-partnership.

—*Dike* v. *Martin,* 85 Okl. 103, 204 Pac. 1106;
Cassidy v. *Gould,* 86 Okl. 217, 208 Pac. 780;
Blackstock Oil Co. v. *Caston, supra;*
Chowning v. *Graham, supra.*

A consideration of the cases cited on page 27 will show that the facts therein are not applicable here. For instance *McCoy* v. *McCoy,* 30 Okl. 379, 121 Pac. 176, and *Bryant* v. *Mahan,* 130 Okl. 67, 264 Pac. 811, therein cited, when properly read are authority for the contention that the present facts come within the rule as to constructive trusts. *McCoy* v. *McCoy* is cited on the subject by the leading case in Oklahoma of *Dike* v. *Martin, supra.*

On page 27 petitioners say:

> "If the oral agreement contended for by respondent does not constitute an attempt to create an oral express trust, nevertheless, under respondent's theory he was to receive a one-tenth interest in the leases in consideration for certain services. Such a contract has been squarely held by the Supreme Court of Oklahoma to be violative of the statute of frauds and unenforceable." (Citing *Hall* v. *Haer,* 160 Okl. 118, 16 P. (2d) 83.)

The facts in the *Hall* case clearly distinguish it from the case at bar: *First,* there was an entire absence of any trust relation. *Secondly,* the agreement to convey an interest in lands to plaintiff created the parties co-tenants rather than joint tenants. Here there is no agreement to have Kasishke or his *alter ego* convey to respondent anything. Respondent and petitioner Kasishke had the titles

taken in the name of another with no provision to convey or reconvey. The properties were to be developed for the joint interest of both. Only upon the termination of the venture should there be a conveyance, if any, and that by the rules of equity in such cases provided—certainly not by any specific agreement of the parties. Thus the case is ruled by *Chowning* v. *Graham, supra,* where the whole subject is treated, even to the point of partial performance. We call attention to the fact that in *Bahnsen* v. *Walker,* 89 Okl. 143, 214 Pac. 732, cited and relied upon in the *Hall* case, it is pointedly stated that no question of a trust nature obtained between the parties, so unlike the case here. That case did not hold that personal services were not sufficient consideration to create a joint adventure. The court, however, holding that no elements of a joint adventure were present, proceeded to discuss the personal services question. *Hall* v. *Haer* was by a divided court and in *Ross* v. *Holland,* 189 Okl. 428, 11 P. (2d) 798, has been seriously questioned.

It is contended in (G):

> "Respondent having abandoned and renounced the alleged joint adventure may not under the statutes of Oklahoma recover profits earned by the enterprise subsequent thereto."

As authority they cite Sec. 8116, Compiled Oklahoma Statutes 1921, which applies to a *renunciation* of partnership and they seem to intimate in their petition that this section was passed in order to systemitize and make clear and concise the rights of partners and joint adventurers in the oil business. The fact of the business is this statute was brought from the Dakotas to Oklahoma years prior to the discovery of a single drop of oil in this state.

Under this contention petitioners claim that the so-called letter of resignation of respondent was a renunciation of his interest in the venture. A copy of the letter will appear on page 33 of the record. We call attention to the very friendly spirit in which it is couched. It is not outright, unqualified resignation, as it says:

> "I think it best for me to *tender* my resignation knowing this is your wish." (Italics ours.)

The letter then says:

> "If there is anything that comes up just feel free to call on me and I shall be glad to either explain or assist you on same."

Here is a standing offer by respondent to continue to perform his part of the agreement. This letter was never answered by Kasishke. It seems absurd to us to try to torture this language into the renunciation meant by the statute. The trial court held and the Circuit Court of Appeals affirmed the finding of fact that this letter of offer of resignation was brought about by the sole fault of petitioner Kasishke and the Circuit Court said:

> "It would indeed be strange if one could use his own wrongful conduct to deprive another of his interest in a common enterprise."

We again refer to Finding of Fact XV (Tr. 64). On page 32 of the petition it is said:

> "It is also important to point out that the judgment below actually decrees specific performance of the alleged partnership contract here involved. It makes respondent a partner, with a one-tenth interest, with petitioners for all time to come. Specific performance of a partnership agreement of the character here found will not lie because partnerships not limited in term are terminable at will and involve personal services."

Contrary to petitioners' statement, the court did not decree specific performance of a partnership agreement but held that the partnership was dissolved as of the 5th day of June, 1939. In decreeing respondent a one-tenth interest in the properties it is but a distribution in equity of the partnership assets.

Before closing we desire to reply to a statement on page 29 which we quote:

> "And this irrespective of the fact that no accounting has been had to determine if the leases have paid out and earned profits. Baker keeps his interest even though an accounting might show no profits from the business."

The provisions of the judgment transferring Baker's interest in the properties at the expiration of sixty days was the suggestion of petitioners. They wanted a determination that the judgment was final before an accounting was had. Under agreement petitioners filed the transcript in the Circuit Court of Appeals immediately and under agreement respondent filed a motion to dismiss the appeal for want of finality. Petitioners appeared as the record will show, and strenuously argued that the judgment was final and succeeded in having the Circuit Court of Appeals so hold. They made no objection to the verbiage or phraseology of the judgment whatever. They briefed and argued the case in the Circuit Court of Appeals on the theory that it was final. The doctrine of invited error certainly applies here. As the language and the phraseology was written as a favor to them, as they did not desire to go through the process of an accounting until it was decided whether it was a final judgment, yet they were fearful that if they waited until after

an accounting to file their record on appeal they would be met with the objection that the appeal was filed too late.

Having considered the application of petitioners for a writ of *certiorari* we respectfully submit, *first*, that petitioners have wholly failed to state any valid reason in law or in equity why the writ of *certiorari* should issue. They have not shown that the judgment of the lower court is not just and equitable according to the merits of the case. They have not shown any real or fancied conflict between the Circuit Court decision and the decisions of the Supreme Court of Oklahoma, nor have they shown that any sections of the statutes of Oklahoma applicable to the case at bar have been ignored or violated.

It is respectfully submitted that no lawyer, nor those intending to engage in the oil business as joint adventurers can possibly be misled by the eighth paragraph of the syllabus in this case, nor will it bring about any confusion amongst bench and bar as it follows almost word for word the quotation from the case so heavily relied upon by petitioners of *White* v. *A. C. Houston Lumber Company, supra.*

We therefore respectfully submit that the writ of *certiorari* should be denied.

CONN LINN,
PAT MALLOY, JR.,
M. A. BRECKINRIDGE,
Attorneys for Respondent.

April 24, 1945.